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SOME CONSEQUENCES OF UNENFORCEABLE LEGISLATION ¹

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New York City

THERE is a goodly number of very estimable persons who, either because they live too far removed from the haunts of men to know how and why things happen in this work-a-day world, or because they themselves believe all they see in print, or because they take too seriously the boasts of our Fourth-of-July orators that ours is government of laws and not of men, hold firmly to the opinion that there is in a statute a certain alchemy whereby the elements of leaden soddenness and brazen vice that enter into the composition of society may of an instant be transmuted into the pure gold of spirituality.

They conceive, apparently, that by some process of hypnotic suggestion a law upon the statute books will induce in the community the virtues which, through its enactment, the community officially professes; and they are so enamored of the idea that they will insist upon the retention of a law even though the experience of centuries may have taught that the community will have none of the law and that virtue is not induced by it. Hence they insist upon enactments such as our Sunday liquor laws and the statutes requiring the total suppression of prostitution by criminal process.

Presumably, they do not realize that a statute may be inherently unenforceable, and that statutes such as these which do not appeal to the community as wise or just or expedient will not and cannot be enforced. Apparently, they do not know that such a statute almost inevitably entails consequences worse than the evil at which it is ostensibly directed, and it probably shocks them inexpressibly to be told that they are

¹ Read at the Conference on the Reform of the Criminal Law and Procedure, May 13, 1911.

among the most effective—even though the unwitting allies of the blackmailer, the pander, and the crooked politician, and that the demoralization of police departments, the stimulation of prostitution and the horrors of the white-slave traffic are in large measure to be laid at their door.

To most of us this is an old story, yet the delusion persists, and the persistence of the delusion among those who exert so much power for harm, when they have so much power for good, is my excuse for the demonstration of the obvious to which I am about to proceed.

There is recorded by historians of the criminal law an enactment among the laws of King Canute, in the following terms: "Though anyone sin and deeply foredo himself, let the correction be regulated so that it be becoming before God, and tolerable before the world, so that punishment be inflicted and also the soul preserved."

Thus at an early stage of the system of jurisprudence and penology of which our own is the lineal descendent, there was a recognition of the potential divergence between ethical ideals and their practical realization in the administration of the law, which is the subject to which I am to direct your attention today.

Penalties, according to Canute, were to be not only "becoming before God," but "tolerable before the world;" and while it may be that the antithesis which was thus presented was unintended and that the interpretation which I put upon the edict would have shocked inexpressibly its devout author, it is certain that thus interpreted the edict enunciated a principle whose soundness has been demonstrated throughout the history of the criminal law.

For it is, of course, familiar history that no law which was not "tolerable before the world," that is, which did not appeal to the general body of the community as just, moderate and in conformity with the public needs, has been permanently enforceable, except, perhaps, by the strong arm of a despotic government. This was true to some extent even in early times and under conditions in which the community at large participated but slightly in the administration of the law; for hostility to

such enactments has been as manifest among the judges and others charged with the administration of the laws as among the people upon whom their unduly heavy hand was designed to fall.

In earlier days and under despotic governments, it is true, unpopular laws might be enforced for a time, provided that it was the desire of the ruling authority that the law be enforced, since administrative officers and judges who were appointed by the crown and subject to direct penalties for disobedience to the sovereign will, and jurors who were likely to find themselves in the prisoner's place if the verdict was displeasing to the judge, were under a powerful incentive to abide by their respective oaths of office and to apply the law to the facts as they found them, without too nice a regard for the eternal fitness of things as it appealed to their individual minds or consciences. Under the milder conditions of our day and generation, however, when jurors are wont to be a law unto themselves and to confer favor without fear, it has become clear that such laws are absolutely incapable of enforcement, and that where a penal statute does not appeal to the general body of the community as wise or fair or expedient, it becomes a dead letter. The public opposition manifests itself at the polls, in the grand-jury room, in the petit-jury box, and not infrequently on the bench itself. Of this we have had the most convincing proof in the history of legislation against the liquor traffic and the social evil.

It is familiar history that candidates for office have been elected to it on the basis of their promise to ignore the restrictions of the excise laws; that officials, otherwise exemplary, have been denied re-election because of attempts to enforce the law; that such occasional attempts at enforcement as have been made have always been futile for the reason that grand juries refuse to indict and petit juries to convict, and that judges decline to impose sentences of sufficient severity to have any deterrent value. For illustration we need not depart from our own city. We have all seen estimable gentlemen bidding for election to the mayoralty of the city of New York on the basis of the promise that the excise law—as to Sunday opening of saloons—would be “liberally enforced,” a phrase which was hardly a euphemism for non-enforcement.

At the present day we have the same law nullified by an executive interpretation of the statutes governing the method of enforcement, an interpretation which I believe will impress most lawyers by its ingenuity rather than by its soundness, but to which the community is glad to lend its assent, as it is ready to yield assent to any device which will prevent enforcement.

Moreover, the nullification of the law is in no wise dependent upon executive inaction. Rather it is the fact that executive inaction finds palliation if not excuse in the fruitlessness of activity; for it is a well-known fact that in this city grand juries are loth to indict and petit juries absolutely unwilling to convict for violation of this provision of the law, and that this is true no matter how conclusive may be the evidence that the law has been violated.

Moreover, the courts themselves have assisted in the process of nullification. Under the law in this city, the cases are triable at a court of special sessions, unless removed to the court of general sessions upon a certificate that the case ought to be tried by indictment. The court of special sessions sits without a jury, and its judges are triers of both the law and the facts. Its judges are subject to removal by the appellate division of the supreme court for violation of judicial duty, and a persistent course of decisions counter to the law and the facts would warrant their removal. Hence, if the cases were permitted to be tried at the special sessions, convictions would probably result. But the general statutes also provide that any charge of misdemeanor may be removed from the special sessions upon the certificate of a judge of certain higher courts to the effect that the case ought to be tried by indictment. With respect to offenses in general, this section has been so construed as to limit such removals to extraordinary cases involving either novel questions of law or property rights of great importance. In excise cases, however, under the practise of the courts, removals have become a matter of course. Hence, the prosecution is transferred to the grand-jury room where it usually receives its quietus by the refusal to find a bill.

Through these various agencies the law against Sunday selling has become a dead letter. On the other hand, other provisions

of the same statute are readily and easily enforced—I refer, for instance, to the provisions penalizing unlicensed selling. For this offense the administrative officers are ready to arrest, juries are ready to convict, and the courts are ready to punish. The reason is that the general body of the community believes in the regulation of the traffic through the license system, and that it does not believe in the prohibition of Sunday selling.

And so of the laws against the maintenance of houses of prostitution—I do not mean of the entire body of law directed against the practise of prostitution and offenses kindred to it or growing out of it, but the law which makes it a crime to maintain a house in which prostitution is practised even though in all respects it is quiet and orderly. Theoretically, the maintenance of such a house is punishable either as a nuisance or under a special statute in nearly all the states of the union at the present day, and has been so punishable ever since there was a government on this side of the Atlantic, as it was punishable before that in England. Yet, I think it probable that there is no city in the United States or in England, for that matter, where such houses, in one guise or another, do not flourish to-day and in which they have not flourished uninterruptedly and without substantial interference for the past fifty years—to go back no further—unless we accept as accurate the conclusion of the president of the police board of Jersey City, that he has been able to drive all the prostitutes out of that city by reason of its proximity to New York,—and on that basis concede a single exception to the rule.

In most of these cities they are conducted openly and with no attempt at concealment. In some they are segregated, subjected to regulation and even to medical inspection at the instance of the police, who in every such case are, theoretically, indictable for their neglect of duty in failing to arrest and prosecute, and who, theoretically, furnish evidence for their own conviction every time they conduct an inspection or enforce a regulation. In other cities they are tolerated with no avowed attempt at regulation, and while there is no trustworthy evidence on the subject, it is reasonable to suppose that in all these cities such houses are blackmailed.

For the persistence in this open defiance of the law, the police are little to blame. They know that they could not enforce the law if they tried, and they know, as we know, that the community does not want it enforced, because the community, rightly or wrongly, believes with Lecky and others that prostitution in some form or other is a necessity, and that it is only by the sacrifice of a certain percentage of the women of the community to a life of prostitution that the sexual integrity of the great majority can be preserved from violation through seduction, fraud or force.

It is unnecessary to inquire, and it is beyond the scope of this paper to inquire, whether that conviction is sound; it suffices that it is deep-rooted and persistent—so deep-rooted and persistent that any man who to-day in this city should endeavor to suppress the houses of prostitution would, by a large part of the virtuous and intelligent portion of the community, be regarded as little short of a public menace.

If any one is moved to doubt these conclusions, either as to the possibilities of enforcement or as to the temper of the community, let him but read the last report of the Boston police commissioner. Commissioner O'Meara is a repressionist, and, as a man of intellectual as well as financial and moral integrity, he has no patience with the devices of "liberal enforcement." For the past five years he has been doing his best, patiently and with a grim determination, to enforce the law. He has been fighting under what is theoretically an extraordinarily efficient system of laws, since in Massachusetts the statutes are logical. There fornication is a crime for which men and women are alike punishable, and the men found in the bawdy houses can be prosecuted.

His results can be summarized as follows: He secured a large number of convictions, but few sentences of deterrent value; he closed a number of houses, some temporarily, some permanently. As a result, the resorts have become scattered, the business has become modernized and has taken on a form more insidious and more difficult of detection; the street soliciting has gone on, and the community has grown indifferent. His final word on the subject sums up the results of his experience with the public as follows:

The police department regards the business of vice as a social tragedy which has gone on from the beginning and presumably will continue to go on to the end ; but police action against it is confined, of necessity, to the attempted enforcement of the laws. The police have no other mission or authority, and their efforts to reduce the profits of the business, to secure the adequate punishment of those who engage in it, and thus check its growth, have met with practically no helpful or appreciative response from any direction. If a future police commissioner were intending to pursue the same course with respect to the business of vice that has been followed for four years, I should advise him that he might expect loyal support from the police when once he had convinced them that he was in earnest ; little encouragement from courts ; bitter hostility from persons whose profits were curtailed ; indifference from the public ; and from a few enthusiasts in the cause of social purity, whose admirable purposes are not sustained by straight and intelligent thinking, he would be sure to receive some measure of abusive criticism. I should advise him that unless he held his oath of office in high regard, and cared for no reward other than the consciousness that he had done his duty faithfully and with some benefit to the community, it would be better for him personally that he should follow the easy road of indifference, which is always chosen by those who are officially blind.

The verdict of his experience is, I believe, conclusive ; it is the confirmation of the conclusions of nearly all who, having equipped themselves to think, have given serious thought to the subject. Where he failed I believe it impossible that anyone else should succeed.

But what of all this? it may be asked. Assuming that this is the temper of the community, is there not a respectable minority, at least, that believes in Sunday closing and in the suppression of the bawdy houses? Is it not true that at some time there must have been a majority holding such belief, else there could have been no such statute? And is it not true that unless the majority held to it now, the statutes would be repealed? And, finally, is not an unenforced law, if it embodies an ideal, better than no law at all ; and is it not better that the higher aspirations of the community should be registered on the statute books, to the end that the community may have a tangible expression of its ideal to stimulate it to the achievement of that ideal?

The argument shadowed forth in these questions is seductive, and it is because it has by its seductiveness captured the minds of the people who, if they saw the other side as I see it, might bend their energies toward so harmonizing the law with the belief of the community as to make it an instrument for good instead of an engine of evil, that I have been moved to present that other side.

Three questions are thus proposed: First, is it not true that at some time there must have been a majority holding the belief that bawdy houses ought to be suppressed? Second, is it not true that unless the majority now hold to that belief the statute would be repealed? Third, is not an unenforced law, if it embodies an ideal, better than no law at all? The last question is perhaps the only one which is strictly germane to this discussion; but as the first two tend to create a doubt as to the major premise of my syllogism, namely, that the laws in question do run counter to the real sentiment of the community, it may be worth while to pause for a moment in order to suggest the answer to them.

To anyone familiar with the methods whereby legislation is secured, even at the present day, it is hardly necessary to suggest that the enactment of a statute does not indicate in the least that a majority of the thinking people of the community desire its enactment or that they are interested in the subject. We all know that the laws find their way upon the statute books, either because some few thinking people, in or out of the legislature, have succeeded in persuading the legislature that such laws will make for the public good, or because some designing people have a personal and selfish interest to serve which the enactment will further; or from a combination between the well-intentioned people, who, by their very rectitude, are incapable of imagining the evils that a law may entail, with persons whose imaginations run only in the direction of self-interest, and who see only the opportunity for pecuniary gain through the non-enforcement of the law; and that it is rarely that a law is enacted because of any widespread public demand for its passage. We have no reason to believe that in other times laws originated in any different manner; and, on the contrary,

there is every reason to believe that under less democratic forms of government, laws were even less likely to be enacted primarily in response to a public demand. And indeed we have the opinions of leading historians of the law that the more stringent laws on this very subject of sexual immorality found their way to the statute books in 1650 because "the ruling powers found it to their interest to put on a semblance of very extraordinary strictness and purity of morals," and that these laws were thus enacted in response to that policy which is described by the politicians of our day as "pandering to the virtuous element of the community." So much for the argument as to the original enactment of the statutes.

The argument that is derived from their retention is answered by the fact that the general body of the community has little incentive to seek the repeal of an unenforced law, and that those who have such incentive, namely, those who would suffer punishment if the law were enforced and who through its non-enforcement suffer from it only in that they are the subjects of blackmail, are not likely to be accorded a favorable hearing even if they dare lift their voices in opposition to the law, and are sure to meet with instant, vigorous, and clamorous opposition both from those whose duty it is to enforce the law and who profit by its non-enforcement, and from those excellent people who believe that it is better that their higher aspirations should be registered on the statute books in an unenforced law than that there should be no law on the subject at all.

We may, therefore, discard all the arguments as to the enforceability of such laws which are based upon their original enactment or their retention on the statute books, and accept unhesitatingly the verdict of experience that the laws cannot and will not be enforced.

We come then to the third question, which opens the real subject of this discussion, namely, Is it better that there should be on the statute books an unenforced law which is expressive of a higher ideal, than that there should be no law on the subject at all? In seeking the answer to this question, let us look at the consequences that flow from such a situation. These consequences are patent, indisputable, inevitable. They

include: the undermining of the public conscience through the spectacle of continuous and deliberate neglect of duty and violation of the oath of office by public officials; the more direct undermining of the sense of civic obligation and of the obligation of the oath, through the disregard by the individual of his own oath in the grand-jury room and in the petit-jury box; blackmail with the increase of political power that it confers upon those that profit by it—concededly the most vicious element in our political life: the demoralization of the police department, as the result of the blackmail; the creation of a partnership in crime between the keepers of disorderly resorts and the police; as the result of that partnership, the non-enforcement of laws which are themselves inherently enforceable, and which the community would insist upon having enforced but for the unenforceable provisions of the statutes with which they are confused in the public mind and the conditions those unenforceable provisions create; and thus the toleration of the horrors over which the community shudders when a Lexow Committee or a white-slave crusade brings them prominently into the glare of the sunlight, and promptly forgets when the committee's report has been filed or the grand jury has disbanded after recommending as a panacea some reform of administrative detail which is bound to be ineffective because it fails to attack the cause of the evil.

I can touch but lightly upon the less important of these consequences, and indeed they are so obvious that the bare statement of them will suffice to demonstrate their existence and to suggest their far-reaching and injurious effects. Thus, it needs no argument to establish the vitiating effect upon the community at large of the known existence and known unenforcement of statutes such as we are discussing; especially when it is accompanied by such exhibitions of intellectual disingenuousness from respected citizens in high office as find expression in phrases about "liberal enforcement," and in arguments with respect to the necessity of devoting attention to the infraction of other and more important statutes, and the consequent necessity of ignoring the violation of the unpopular laws. Nor is it necessary to debate the demoralization of the individual which re-

sults from the habitual disregard of his solemn promise made in the grand-jury room or the petit-jury box, to apply the law as it is laid down to him to the facts as they are established before him. Manifestly such experiences can result only in a weakening of respect for the laws as such, and in a general belief that the citizen owes no obedience to a law because it is a law, and that he is bound to obey only those laws which meet with his approval.

Nor is it necessary to discuss the rise of blackmail as the result of such statutes. That it must result is apparent to any thinking mind. That it does exist is the uniform testimony of all who have had occasion to deal with the question. According to the public prints, the mayor of this city has recently asserted that, as the result of his particular methods of dealing with the laws against Sunday liquor-selling, the blackmail had been reduced by \$3,000,000 per annum. It is not necessary to deal with the accuracy of his conclusions that the blackmail has been eliminated, though it may be said in passing that his method is one that leads to non-enforcement, and that if it has eliminated the blackmail and not merely diverted its course and perfected its organization, it has been by making it clear that he will not permit the ex-blackmailer to enforce the law. The immediate point is that he testifies to \$3,000,000 as the amount of the blackmail from that source alone. The blackmail from prostitution is, in the nature of things, difficult of approximation. The recent report of the Chicago Vice Commission, after what appears to have been a careful and conservative census, places the number of regular prostitutes in that city as 5,000. It is fairly safe to assume that in the larger cities of the same general character as to population and surroundings, the number varies approximately as the population. Upon that basis the number for New York would be between ten and twelve thousand. Some guesses have placed it as high as 30,000. There was evidence before the Lexow Committee, and there has been evidence since, of payments at the rate of about \$20 per prostitute per month. At this rate, and accepting the number of prostitutes as 10,000, the direct blackmail would be about \$2,500,000 a year. All this is paid either to

the police, or to that lowest of all types of politicians whose power is largely derived from the misuse of the funds he has thus secured, and from the power for all kinds of villainy that his control over the dregs of humanity affords him; but whose utter degradation does not always prevent him from occupying an important place in the counsels of his party.

That demoralization of the police department—and by this I do not mean the occasional decrease in efficiency, real or alleged, such as has recently been the subject of popular discussion in this city, but a general, persistent, devitalizing, chronic demoralization,—must result from these conditions is also obvious to all who will give the subject a moment's thought.

How can it be otherwise? How can it be expected that the police will resist the temptation to be venal, when as the result of mere passivity on their part riches will pour into their coffers in almost torrential streams? There have been police precincts in the city where the monthly income from illicit sources has been rated at \$30,000 a month—\$360,000 a year. Not all of this went to the captain of the precinct. He divided with those higher up, in varying proportions and to varying altitudes in different administrations; but if only one-sixth remained with him, and if his income from those illicit sources was only \$60,000 a year, was it reasonable to expect that an officer whose salary was \$2,750 a year would refuse to accept it, and would choose rather to enforce or to attempt to enforce a law which the community as a whole desired to see forgotten?

Of course, it is horrifying that he should levy or accept blackmail, and it is easy for those of us whose temptations are of a different order to look with disdain and disgust upon these practises. But let us examine his course of reasoning, and see whether his acceptance of blackmail is not, as human nature is constituted, practically inevitable.

He can drive the prostitutes out of the houses of prostitution only by extra-legal methods,—for convictions followed by the fines which the courts as a rule impose, have but little deterrent effect. As Commissioner O'Meara says, they are paid, charged to profit and loss, and the business goes on. If he does drive them out, what has he accomplished? Driven from the houses,

where on the whole they do the least harm, they will frequent the Raines-law hotels and walk the streets. If he drives them off the streets, they will go back to the houses or scatter through the tenements, and the net result of his activities will be the harassment of some hundreds of human beings, whose lot is at best none too enviable, and the distribution of their activities over fields hitherto uncontaminated by them.

Hence, he may be conceived as saying to himself: "Why should I enforce the law? Nobody wants it enforced, and nothing but harm results from the attempt. On the other hand, is it not fair that I should be paid for my acquiescence in what the public wants? For do I not run a risk of removal from the force and even of criminal prosecution whenever a reform wave strikes the community or a hostile police commissioner wants to get rid of me; and if I am to serve the public by recognizing its hypocrisy and giving it what it wants in spite of its pretense at forbidding it, and if I am to render this service at such personal risk, why should I not receive a remuneration commensurate with the risk?" And so he becomes a social philosopher of the *laissez-faire* school.

There is no need to expatiate upon the sophistical character of the argument, but it is a familiar trait of human nature that men find little difficulty in believing what they want to believe; and \$60,000 a year has been known to affect the creeds of persons higher in the social and educational scale than policemen.

What of the effect of these practises upon the rank and file of the department? They have heard promulgated by the chief executive of the city the general doctrine of "liberal enforcement." They have received specific instructions from the precinct commanders as to the degree and direction of the liberality, and they know how liberally the liberality is being reciprocated. More specifically, they all know that the captain and those higher up are "getting the stuff." Why should they not get theirs, not only from the saloon-keeper and keeper of the brothel, but for that matter from the pickpocket and thief and burglar? For if it is legitimate according to the rules of the game to take money from the continuous offender, why not from the casual offender? Of course, there is a flaw in

this logic, but then the patrolman does not pass a civil-service examination in logic, and logic has been known in other walks of life to weigh lightly on the scales when the pocketbook was in the opposite pan. Certainly, there can be no incentive to rectitude and honesty and obedience to duty in the example thus set before the eyes of the patrolman; especially when he has opportunity to observe that it is the grafters in the department who get promotion, and that the policeman's progress is not even as that cynically attributed by Sydney Smith, I think, to the lawyer, namely, that "first he got on, then he got honor, then he got honest"—since whatever else happened to those who rose in the ranks of the police and whatever else they got, they rarely got honest.

Is it necessary to expatiate further upon the effects of these conditions upon the morale of the rank and file? Is it conceivable that they could lead to anything but utter demoralization? Is it conceivable that a body of men thus led could form any ideal other than that of getting rich by hook or crook, or literally by "hook and crook," if the slang may be forgiven. And certainly it is no small thing in a community to have ten thousand of its picked men, men picked for their superior physical and mental endowments, thus corrupted.

In the face of such a system, who and what is a police commissioner? In the face of the solidarity that results from the concerted hunt for plunder, what can he hope to accomplish?

We hear much of the difficulties of a police commissioner's situation. Under present conditions they should be described as the impossibilities. But I have had police commissioners say to me, and I dare say that almost any police commissioner who will talk frankly will say to anyone, that his office would have no more than the ordinary administrative difficulties, that the duties would be easy of performance, if it were not for the situation created by the absurd laws on Sunday opening and on prostitution. And so I conceive that one of the prices that we of this city pay for these laws is the demoralization of ten thousand of our picked men and the corruption and essential insubordination of our police department.

Yet all this I believe to be among the lesser evils. The

greater evil by far lies in the effect of these laws in preventing any rational treatment of the social evil and in delaying the day which it is hoped will dawn in a not too distant future when repressive measures may be effectually invoked.

The worst evil is that through these measures the police, who, under a rational system of laws, ought to be available for the minimizing of prostitution and the extirpation of some of the horrors which are incident, but not necessarily incident, to it, have become partners in the business, and thus blinded by their self-interest even to those offenses which, whatever may be said of prostitution itself, are neither necessary nor "tolerable before the world." I mean prostitution in tenements before the eyes of the children of the poor, street walking, and the practises of the Raines-law hotels, and, worst of all, the debauching of women for the purpose of prostitution—the hideous trade of the "cadet." The partnership between the police and the keeper of brothels is no mere figure of speech. It is a living, shrieking fact. If sharing of profits and coöperation in the conduct of a business constitute a partnership, then such a partnership exists.

The picture was painted some sixteen or seventeen years ago by the Lexow Committee in vivid colors:

The testimony upon this subject, taken as a whole, establishes conclusively the fact that this variety of vice was regularly and systematically licensed by the police of the city. The system had reached such a perfection in detail that the inmates of the several houses were numbered and classified and a ratable charge placed upon each proprietor in proportion to the number of inmates, or in cases of houses of assignation the number of rooms occupied and the prices charged, reduced to a monthly rate, which was collected within a few days of the first of each month during the year. This was true apparently with reference to all disorderly houses, except in the case of a few specially favored ones. The prices ran from \$25 to \$50 monthly, depending upon the considerations aforesaid, besides fixed sums for the opening of new houses or the resumption of "business" in old or temporarily abandoned houses, and for "initiation fees" designed as an additional gratuity to captains upon their transfer into new precincts. The established fee for opening and initiation appears to have been \$500.

Thus it appears that transfers of captains, ostensibly made for the purpose of reform and of enforcing the discontinuance of the practise, the prevalence of which seems to have been generally understood, resulted only in extortion from these criminal places of additional blackmail. . . .

As an evidence of the perfect system to which this traffic has been reduced, your committee refers to that part of the testimony which shows that in more than one instance the police officials refused to allow keepers of disorderly houses to discontinue their business, threatening them with persecution if they attempted so to do, and substantially expounding the proposition that they were there for the purpose of making money to share with the police.¹

This, to be sure, was in 1894, and that is long ago, but substantially the same conditions were found by the Mazet Committee in 1899, and by the Committee of Fifteen and the district attorney in 1901, and I have no doubt that while conditions may in some respects have changed, there is today no difference in the essentials.

Now, what is the first result of this partnership? Naturally, stimulation of the business. The more prostitution the greater the revenues of the police; and this applies, under existing laws, to the business of the street-walker as well as to prostitution in the organized house; for let it not be supposed that the police have been so careless in their business methods as to overlook the small profits to be reaped from the street-walker. The Lexow Committee found that there was no leak in this direction. They reported:

The evidence establishes, furthermore, that not only the proprietors of disorderly houses paid for their illegal privileges, but the outcasts of society paid patrolmen on post for permission to solicit on the public highways, dividing their gains with them.²

In the trial of a police captain some ten years ago, there was testimony of the method whereby these pickings were safeguarded. Men were employed to walk the streets and accom-

¹ *Report and Proceedings of the Senate Committee appointed to investigate the Police Department of the City of New York.* Albany, 1895. Vol. i, pp. 33, 34, 35.

² *Ibid.*, p. 35.

pany street-walkers who solicited them, to note their names and addresses and to report them to the captain. Upon such report the captain examined a little book. If the woman was registered and had paid her dues to date, all was well; if she was not registered, or had not paid her dues, she was immediately served with an order to show cause why she should not subscribe a sum—I think it was \$20 a month—to the support of the police system, and there was as a rule no disposition to evade the order.

Moreover, this partnership does not stop at mere sharing of profits, but involves, as it would be expected to involve, co-operation in the conduct of the business. It is of course a familiar fact that the efforts of private individuals to obtain evidence and to take measures against houses of this character, have met with the constant opposition of the police and that such efforts as a rule have been frustrated by them. This is bad enough, but the community of interest leads to coöperation beyond such defensive measures.

One of the necessities of the business of prostitution is the raw product. If prostitution is to be maintained, a certain amount of raw product must from time to time be supplied, and the greater the stimulation of prostitution, the greater must be this supply; also the more hazardous the business, the more recklessness in using and abusing the supplies.

Of course, it is a horrid trade, but then "business is business" and always has been. It is part of the history of negro slavery that some of the slave owners in the south found it more profitable to work their "niggers" to death and buy new ones, rather than to work them rationally and conserve their lives and energies; so it is not too much to be wondered at that some of the slave drivers of the prostitutes, whether keepers of houses or pimps who live with them and on their earnings, have found it more profitable to work their slaves to the utmost and to discard them for new and fresh material when they are completely spent.

One of my first activities when I became an assistant in the office of the district attorney ten years ago was the institution of a prosecution of two men who had inveigled two young

girls into a house of prostitution. As I remember, the girls were about sixteen years of age. They had been kept prisoners in the houses for about three weeks before they were rescued. The tales they told as to the excesses to which they had been subjected were to me unimaginable; and if I had not had them confirmed many times since by the experiences of others, I should have difficulty in believing them to this day. It was almost inconceivable to me that, even apart from the ravages of disease, such excesses should not have led almost immediately to insanity, and both girls were infected with disease to an extent that made it necessary for a complete operation to be performed. These, I have since learned, were typical cases—typical of the methods of the keepers of such resorts—and probably if the business was to be carried on at the prevailing rates, fifty cents or a dollar being the charge to the customer, such practises were necessary, since it would have been impossible to pay the remuneration to the “cadet” and the blackmail to the police and still pay the rent for the space necessary to accomodate a larger number of inmates and work them less hard, especially at the exorbitant rates which are exacted by the property owners when they rent to prostitutes. Hence, the necessities of the business required a constant renewal of the supply of raw material and a constant alliance with the “cadet” who furnished the supply. Moreover, it required the practical imprisonment of the unfortunate victim; since if escape were possible no human being would have submitted to the excesses and abuse which this life entailed. This business of ruining girls and keeping them in durance could not be carried on without the active connivance and participation of the police.

If the police had desired to stop the traffic,—even though permitting the houses themselves to run—it would have been the simplest matter in the world. As a matter of fact, they had but to give the word and it would have stopped. But even assuming some real police activity to have been necessary, it would have been necessary only for them to have made it clear that their sympathies were enlisted against the traffic, and to have made an occasional inspection of the house so that any inmate of such a house might know that to gain assistance and

relief she had only to make an outcry when a policeman was passing, or to appeal to him when he visited the house, and it would have been impossible to detain any inmate for twenty-four hours. The trade was and is possible only if the underworld understands that the police are in alliance with the law-breakers and will not interfere. If the attitude of the police were different, the business of the "cadet" would cease or at all events would be reduced to a minimum, for with active police interference which would prevent imprisonment of the victim and would seek earnestly to discover and to punish the criminal, the price payable to the pimp would be too low and the risks too great to make the trade a popular one. It might be going too far to claim that the traffic could be entirely suppressed, but I believe it would not be going too far to say that it could be reduced to a negligible minimum—if such a phrase can be applied to such a subject.

Now, why this attitude on the part of the police? First, because the call of the pocket-book was against interference—for how could their partners thrive if supplies were cut off? Second, because the "cadets" were often under the protection of people of importance who had an interest in the traffic, and might become people of importance themselves. Third, because the police officer who has allowed a house of prostitution to run for a number of years or months, when everybody knows he could have closed it and has been sharing in the profits, may be subjected to serious embarrassment if any great publicity be given to the fact that such horrors are being enacted in it.

The only possible conclusion, therefore, is that the police connive at this traffic as they connive at the rest. Nor does the conclusion result solely from deductive reasoning. Direct evidence of police connivance is of course rare, but there is in the records of the Lexow Committee a pitiable tale of an attempt by a woman, herself the keeper of a house of prostitution, to rescue her niece, whom she had sought to keep pure, from another house into which she had been lured, of her fruitless pleadings with the police, and her offers of money for their assistance, and of the revilings, insults and threats with which she was repulsed by them.

And the chasm of years between the Lexow Committee and the present day is bridged by one of the incidents published by the Committee of Fourteen in its report of last year. The story is short, and I offer it in full:

One afternoon a little girl who worked in a corset factory in Bridgeport, Conn., went for an outing to a nearby pleasure resort where she met a notorious "cadet" from New York City. This man persuaded the ignorant girl to go aboard a boat at the dock for something to eat. Before she was aware of the fact, the boat had started for New York. On reaching the city the "cadet" took her to a disorderly house, where she was finally starved into submission. The house was a popular one, and she and the other girls sometimes received as many as twenty men in one evening. The girls were given a brass check for each man, which represented her share of the proceeds. While she was in this house she was compelled to give all her checks to the "cadet" who brought her there, he, in turn, cashing them and keeping the money. Finally she escaped and appealed to a policeman for aid, but he assaulted her instead. In despair, she went to a saloon, and a bartender took her under his protection, and she solicited for him on the street.

I believe that this is a typical occurrence.

One result the bawdy-house law, with the occasional spasmodic attempts at enforcement, inevitably produces. It has diminished the number of organized houses of prostitution, that is, of houses where vice is practised in its least attractive and least harmful form, and has increased the number of prostitutes plying their trade singly or in small groups in the apartments and tenements, and at times the number of those who walk the streets and support Raines-law hotels and other houses of assignation, and has thus emphasized the evil in its most noxious form.

A reason for this change is not far to seek. It is a comparatively easy thing to secure evidence sufficient to prosecute the keeper of an ordinary house of prostitution, and a precinct commander finds it difficult to explain the persistence of such a house in opposition to his will. In the spasm of civic virtue that ran its course during the years 1901 to 1903, or thereabouts, one police captain was convicted in a criminal court,

and, if I remember rightly, several others were dismissed from the force for allowing the ordinary houses of prostitution to run unmolested in their precincts. Since that time there has been a succession of police commissioners more or less addicted to the fad of reform who were suspected of a desire to get rid of a number of the precinct commanders for what, if I may employ a much-abused police phrase, might be termed "the good of the service." For a police commissioner to convict a captain of neglect of duty where he failed to "detect and suppress" an ordinary bawdy house, was comparatively easy. To find sufficient evidence to convict him where the same amount of prostitution was scattered through the tenements and massage parlors and on the streets, was much more difficult. Moreover, in such a disorganized condition of the department, with a reform head and an unregenerate neck, body and tail, protection was no longer sure to protect—at all events, to protect from annoyance—if the business was carried on in a manner that rendered it easy for anybody to get evidence upon which to base a prosecution. Therefore, the more noxious form of the offense became safer—both for the practitioner and for the captain.

Hence, the results of our repressive statute upon prostitution apart from the effect upon the police and the community at large have been: (1) that we have prostitution in its more objectionable rather than in its less objectionable forms; (2) that we have the horrors of the white-slave traffic unchecked by the activity which is legitimately to be demanded and expected of the police.

It may be asked with pertinence, how all this is to be attributed to this particular repressive law, and how conditions would be altered if we had not that law. I think the answer will be clear if we will but marshal our facts, examine them in the light of experience and apply our reasoning powers to them unhampered by our prejudices.

It is admitted, I believe, by all who have given thought to the subject that the least harmful form in which prostitution appears is in the organized house, and that, if we must have it at all, it is better that we should have it in that form. The average man cannot conceive of a condition of society in which

we shall not have it at all; he believes that if we do not have professional prostitution we shall have widespread sexual promiscuity, and he thinks that the honor of his sister and his daughter is safer by reason of the dishonor of the prostitute. He not only does not desire that prostitution should be suppressed; he desires that it should not be. But there are certain manifestations of it that he would gladly be rid of. He does not approve of the conduct of prostitution in the tenements where the children of the poor can find no escape from its contamination; he does not approve of prostitution when it stalks the streets and makes it impossible for his wife, his sister or his daughter to be out unattended at night without the risk of insult; and above all he does not believe in the "cadet" and the white-slave traffic, and he would readily consent to flay alive or boil in oil those whom he found participating in or conniving at that traffic. But he is very much at a loss what to do about it. Being a sane, practical, and on the whole humane person, he can see no advantage in driving the prostitutes out of the tenements and off the streets if they are immediately to be driven on the streets and into the tenements again from the only place in which they can take refuge, namely, the houses of prostitution. Hence, he takes comparatively little interest in cleaning up the streets, and practically none in cleaning out the tenements.

He would like very much to put an end to the white-slave traffic and the "cadet" system and he is much aroused whenever these disagreeable matters are called to his attention. But he realizes that he is powerless to do anything in this direction, and while he knows that there is something wrong with the police, he does not know exactly what the matter is. So, after electing a new mayor who will appoint a new police commissioner who will, it is hoped, by some process of legerdemain put an end to all this, he wraps himself in his accustomed cheerful optimism and forgets all about it.

Give him, however, some system of law whereby the prostitute may be permitted to live at peace and in order in a house of prostitution—some such system of toleration and moral regulation as was recommended by the Committee of Fifteen

some ten years ago—and I think it safe to predict that that same average person will be found insisting with considerable emphasis that she shall remain there, and that the police shall keep her off the streets and out of the tenements.

Nor will it be found a matter of much difficulty to accomplish this result. In the first place, many of the prostitutes would naturally gravitate to these houses. They are on the streets to-day, because they have no other way of plying their vocation. Those who would not voluntarily abjure the streets would speedily be driven off. It is a well-known fact that street-walking diminishes when there is in a night court a magistrate who makes it a practise to convict and imprison. Under the present system many magistrates are loth to do this, because they, too, are impressed with the absurdity and inhumanity of the system whereby the prostitutes are driven to the streets and then imprisoned for being there. Under a system which permitted them to live in their houses, there would be no longer any inhumanity in punishing those who insisted on walking the streets, and all the magistrates might be expected to work to that end.

The same principles would apply to prostitution in the tenements. A woman who could open a house of prostitution in a private house, without fear of interference from the police and with no necessity of paying blackmail to them, or to a landlord or janitor, or to neighbors, would be little apt to conduct such a place in a tenement, especially if she realized that it would be no very difficult matter for her neighbors to secure evidence against her and that upon conviction she could no longer hope to escape with a fine, but must expect imprisonment as a certain consequence.

The disappearance of the street-walker would mean practically the extermination of the Raines-law hotel and other houses of assignation, since, if the street-walker were eliminated, the greater part of the demand for such accommodations would be ended. And this would be especially true if the law as to Sunday opening of saloons were amended so that there would no longer be any reason for a decent saloon to seek a hotel license.

Moreover, police blackmail would be virtually at an end.

Blackmail is paid for immunity from legal interference. If the police had no right to interfere, except in case of disorder, there would be no incentive to pay it and no possibility of compelling its payment; and this could be assured if, as the Committee of Fifteen advised, such supervision as it might be deemed necessary to preserve were placed exclusively in the hands of a special body of morals police, and the general body of the force were restricted to their duty of preserving outward order and were forbidden to interfere within the houses except when crimes were committed therein. Moreover, with the opportunities for blackmail practically eliminated there is no reason to believe that the earnest coöperation of the police in the enforcement of the laws could not be anticipated. If the police are inherently no better than the average of the community, there is no reason to believe that they are any worse, and if the community will only relieve them of the enormous, ever-present, and almost compelling temptation to evil, there is every reason to believe that they will perform efficiently and cheerfully any duty that is assigned to them.

And this is especially true with regard to all that pertains to the white-slave traffic. Render it safe as well as praiseworthy for the patrolman to interfere with these activities—I mean safe from the departmental point of view—and I conceive it reasonable to predict that we may expect to see a speedy end of the pimp and the “cadet.” The former’s activities cease when there are no longer any street-walkers to be protected by them and to support them; the latter can thrive only in connection with the imprisonment of the prostitute, which would be impossible under a system of inspection by a special morals police.

It might reasonably be expected that such a system would also reduce the total volume of prostitution by reducing the demand for it. The bawdy house offers the vice in its least attractive form, and its patrons go there of malice aforethought and in cold blood. The street-walker offers the seduction of an adventure, a sordid adventure to be sure, but yet one that to a large number who could not be induced either for esthetic or prudential reasons to enter a house of prostitution, makes an appeal. Moreover, she stimulates a demand by

presenting the temptation to whose who oftentimes, if unmolested, would feel no promptings of desire. The woman in the saloon offers some of the same elements of attraction, and she avails herself also of the stimulating effects of alcohol. The Raines-law hotel or the house of assignation to which women of this stamp take their patrons offers, through its comparative privacy, an approximate immunity from detection to those who prefer that their indulgences shall remain unknown.

This reduction in the demand would tend normally to reduce the number of the women who would be drawn into professional prostitution. It might be expected to reduce the number of professional prostitutes in another way. With the elimination of the slave prostitute and the life of constant debauch which the street-walker must live, the life of the individual prostitute would be prolonged and it is to be expected that the demand for new recruits would become correspondingly diminished.

The great reduction in number and the undisguised character of the houses of assignation which must result from the amendment of the liquor law and the elimination of the professional street-walker, would also have a natural tendency to reduce the number of occasional prostitutes. Many women who yield either to the temptation of physical desire or to the demand for additional income would not be tempted unless the road were easy and secure.

Finally, it might be expected to facilitate the work of the moral teacher and the prophylaxist, who are laboring for ultimate suppression. The spectacle presented by the bawdy house—of women paraded as mere beasts to be selected for the purposes of momentary gratification—makes a revolting picture of human degradation which will render susceptible to the moral appeal any whom that appeal can ever reach, and many who could not be persuaded that there was anything essentially vicious in the indulgence that followed and grew out of the tawdry romance of even the most sordid flirtation. The popular misconception that there is relatively less chance of venereal disease from intercourse with the apparently occasional prostitute leads many men to run the risk with women of the streets, while the same men would be deterred by the warnings of the

prophylaxist from jeopardizing, by the risk of infection in a bawdy house, their future happiness and the happiness and health of the women they have married or hope to marry.

Moreover, it would tend to secure the moral reformer and the prophylaxist a hearing, when to-day few will give them ear. Give the community what it wants, and you may hope to convince it that it does not want it after all. Try to refuse it what it wants, and it immediately and insistently demands upon what food you have been fed that you are grown so great as to presume to dictate to it. To-day the average person classes all those who oppose the practise of prostitution in the one category of "unpractical reformers" and looks with distrust and hostility upon the silly people who want to "change human nature" by legal fiat and who hope to suppress by law practises that "offer the natural outlet to a normal instinct" which has sought and found its gratification in this manner since the world began. He insists that the reformer's activities in the past have resulted in nothing save the driving of the prostitutes out of the houses where they belong to the streets and tenements where they have no business to be, and that the "reformer" himself is an ignorant meddler without knowledge or judgment, else he would be about some better business. Hence the "practical man" will not listen to the preacher and tends to pay scant attention to the prophylaxist.

But let the reformer once make it clear that he is not unpractical, that he realizes the strength of the forces that have made the prostitute an element in society almost since society began, that he is not seeking to dam a torrent that no dam has ever been able to restrain, that his purpose is merely to direct the flow so that it shall not inundate the community, and if possible to dry it up at its sources, and he may expect to receive a respectful, even if at the outset a somewhat skeptical hearing from those who today simply scoff and revile. And if he gets a hearing, with the mass and force of the facts behind him, he is bound in the end to prevail.

And thus by the abandonment of the fight for the useless statute it may be possible to arrive the sooner at complete repression through the only means which can ever be effective to

that end—namely, through the education of the men of the community to a genuine comprehension of the magnitude of the evil and to a realization of the suffering and disease for which they are responsible.

In all this there is nothing that is new. It has been said over and over again in different, and often in far better forms, by those who spoke with greater authority. My only excuse for repeating it is my belief that a direct appeal should again be made to the good people who, through their insistence on the letter of their ideal, are letting its spirit languish if not perish.

I believe that they should be besought to look to themselves and to ask themselves whether they, too, are not blameworthy in their ignorance, and whether, while they are seeking to educate the licentious man to a realization of the price that is paid in human misery and shame, in sickness and disease, in death and deformity, for the sensuous gratification which is his sole return, they should not ask themselves whether the moral deformities and physical ills of the community, the demoralization of its officials and servants, the rape, imprisonment and suffering of its young women, the delay of the time when the whole wretched death and disease-dealing plague may finally be eliminated, is not far too high a price to pay for the retention of a lifeless word upon the statute book.

Moreover, I would say to them that they may not take comfort in the thought that they stand for an ideal which admits of no compromise. I stand for the same ideal, and there is no thought that the fight for its accomplishment shall be relinquished. The question is solely of the means, whether through the sword of the law, which has been found futile against the armor of the opposing host, or through that appeal to the mind and heart, that preaching of the gospel of reason and humanity which alone promises a prospect of conversion and reform. And surely it is unnecessary to say to a Christian community that there are other means of enforcing a gospel than by the sword.